Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-271

ANDREW DINKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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In the

SUPREME COURT OF THE UNITED STATES

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- X

ANDREW DINKO,

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v.

UNITED STATES OF AMERICA,

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- X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Andrew Dinko, respectfully prays for this Court to grant a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's order of the 11th day of July,

1978, denying petitioner a rehearing with respect to a judgment of the United States District Court for the Eastern District of New York, which convicted the petitioner of distributing a controlled substance and of a conspiracy to do so, in violation of 21 U.S.C. 841(a)(1) and 846, after trial before Costantino, J., and a jury.

It should be noted that United States District Judge Oakes dissented from the denial of rehearing.

OPINION BELOW.

No opinion was rendered by the United States Court of Appeals for the Second Circuit.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Court

of Appeals for the Second Circuit denied a motion for rehearing on the 11th day of July, 1978.

QUESTIONS PRESENTED.

1. Whether petitioner received constitutionally adequate representation by counsel at his trial (Fifth and Sixth Amendments, U. S. Const.).

2. What standard should be applied to determine when a defendant in a criminal case has been deprived of adequate counsel?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth and Sixth Amendments of the United States Constitution are involved herein, as are 21 U.S.C. 841(a)(1) and 846.

THE FACTUAL BACKGROUND.

The petitioner, Andrew Dinko, and his wife, Patricia Dinko, were tried before United States District Judge Costantino in the Eastern District of New York, charged with narcotics violations as well as conspiracy.

Both of these parties, who were joint defendants, were represented by the same trial attorney, Mr. Quagliata. This, in itself, was prejudicial in view of the fact that Mrs. Dinko took the witness stand while her husband, the petitioner herein, did not.

We know that this Court has access to the record of the Court below and we would ask that they subpoena that record so as to peruse the minutes thereon. Suffice it to say, however, that there were numerous

respects wherein the inadequacy of counsel was demonstrated.

Trial counsel apparently made no motions prior to trial, nor did he make any motion to set aside the verdict. He did not even ask that the jury be polled.

There was electronic surveillance of some sort employed in the case at bar, but apparently no motion to suppress, or any other motion addressed to the surveillance, was made.

While one Thomas A. Manning, Esq., is mentioned as one of the attorneys for the petitioner (at trial), the record makes it obvious that Mr. Quagliata conducted the defense.

In his opening, defense counsel prognosticated that neither of the defendants had ever been in conflict with the law, and also declared that both of these

defendants would take the witness stand, saying "* * * We'll tell you exactly what happened from the mouth of the defendants" (813).

Even the Trial Court was concerned about the sufficiency of the case, indicating that as to petitioner Andrew Dinko, "* * * [The record] is kind of barren of any direct testimony, although there is some circumstantial evidence" (SM 657).

POINT I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFUSING ISSUE OF WHAT CONSTITUTES DEPRIVATION OF ADEQUATE COUNSEL. SHOULD THE "FARCE AND MOCKERY" STANDARD OF INEPTITUDE REMAIN THE CRITERION?

In the Second Circuit the criterion employed to determine whether a defendant in a criminal case was deprived of adequate counsel is whether or not the conduct of his trial constituted a "farce and

mockery" of justice (see *Rickenbacker v. Warden, Auburn Correctional Facility*, 550 F. 2d 62 [1976]).

We need not cite authority for the much-publicized comments of the Chief Justice of this very Court, who has indicated that a large plurality of attorneys are inept. Should the hapless litigant suffer by deprivation of freedom because of this ineptitude?

We submit that the standard of farce or mockery is too extreme.

In *United States v. Wight*, 176 F. 2d 376 (2d Cir. 1949), cert. den. 338 U. S. 950, the so-called "farce and mockery" standard was established in the Second Circuit. This followed similar standards which were recognized in other Circuits, e.g., *Diggs v. Welch*, 148 F. 2d 667 (D. C. Cir.), cert. den. 325 U. S. 889 (1945), and

United States ex rel. Feeley v. Ragen, 166 F. 2d 976 (7th Cir. 1948).

As things stand now, both the District of Columbia, the Seventh Circuit, and four other Circuits, have now abandoned this standard.

The Supreme Court cases on which it relied can no longer withstand analysis. As Judge Oakes pointed out in his dissent in *Rickenbacker, supra* (550 F. 2d at 67, 68):

> "The Supreme Court cases on which it relied, 148 F. 2d at 669 n. 3,[2] all held that, where the

2. The five cases cited were *Moore v. Dempsey*, 261 U. S. 86 43 S. Ct. 265, 67 L. Ed. 543 (1923) (mob violence); *Powell v. Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) (mob violence, no counsel appointed); *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935) (knowing use of perjured testimony by prosecutor; writ not issued for failure to exhaust state remedies); *Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (coerced confession); and *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (no counsel at trial).

trial proceedings had been turned into a farce or mockery of justice, a conviction could not stand; none held that the proceedings *must* have come to that point to warrant judicial intervention. The principal rationale advanced in *Digge*, *id.* at 670 that '[i]n many cases there is no written transcript,' thereby giving a habeas petitioner 'a clear field for the exercise of his imagination' (and thereby presumably inundating the federal courts), no longer holds true, since written transcripts are now generally available. Gideon's Trumpet has long since sounded.[3] We

3. See *Gideon v. Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); A. Lewis, *Gideon's Trumpet* (1964).

should join the several other circuits that have rejected *Diggs* as no longer having precedential value and declare it a dead letter, bringing the law of our circuit into line with the rule of, e.g., *United States v. DeCoster*, 159 U. S. App. D. C. 326, 487 F. 2d 1197 (1973), that, under the Sixth Amendment, 'a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate,' *id.* at 1202 (emphasis omitted). See also Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077 (1973); Waltz, *Inadequacy of Trial Defense Representation as a Ground*

for Post-Conviction Relief in Criminal Cases, 59 Nw. U. L. Rev. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 Harv. L. Rev. 1434 (1965).

"Forty-four years ago, Mr. Justice Sutherland wrote: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' *Powell v. Alabama*, 287 U. S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In 1976 I think our court should recognize that the right is equally meaningless if counsel is not at least reasonably competent."

We submit that the Supreme Court of the United States should take jurisdiction of this case so as to place in harmony the decisions of the various Circuits on this rather thorny issue. It is obvious that if the case at bar had been decided in several other Circuits, there may well have been a reversal.

Justice should be equal for all throughout the country, and should not depend upon the fortuitous circumstances of which Circuit the case happens to arise (see Fifth and Fourteenth Amendments, U. S. Const.).

In view of the foregoing, we ask this Court to accept jurisdiction.

CONCLUSION.

Certiorari should be granted to place in harmony the conflicting determinations

of various Circuits as to the standard to be applied with respect to the adequacy of counsel in criminal cases.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

JUDGMENT.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of January, One thousand nine hundred and seventy-eight.

PRESENT: HON. LEONARD P. MOORE
HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD,
Circuit Judges.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DINKO, a/k/a Kelley, PATRICIA DINKO, a/k/a Patricia Mushington, JOSEPH BOYD, RAYMOND FILES, a/k/a Leroy Files, a/k/a Coco,

Defendants,

ANDREW DINKO, a/k/a Kelley, PATRICIA DINKO, a/k/a Patricia Mushington,

Defendants-Appellants.

77-1399

77-1400.

- X

Appeal from the United States District Court for the District of Eastern New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By ARTHUR HELLER,
Deputy Clerk

ORDER ON PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of July, one thousand nine hundred and seventy-eight.

PRESENT: HONORABLE WALTER R. MANSFIELD
HONORABLE J. JOSEPH SMITH
HONORABLE LEONARD P. MOORE
Circuit Judges.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DINKO, PATRICIA DINKO,

Defendants-Appellants.

77-1399

77-1400.

- X

A petition for a rehearing having been filed herein by counsel for the appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

ORDER ON REHEARING *EN BANC*.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eleventh day of July, one thousand nine hundred and seventy-eight.

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW DINKO, PATRICIA DINKO,

Defendants-Appellants.

77-1399

77-1400.

- X

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellants Andrew Dinko and Patricia Dinko, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Oakes dissents from the denial of rehearing *en banc* on the basis of his dissenting opinion in *Rickenbacker v. Warden*, 550 F. 2d 62, 67 (1977).

IRVING R. KAUFMAN,
Chief Judge